

*United States Court of Appeals
for the Second Circuit*



**BRIEF FOR
APPELLEE**

76-1490

To be argued by
PETER A. CLARK

**United States Court of Appeals
FOR THE SECOND CIRCUIT**

Docket No. 76-1490

UNITED STATES OF AMERICA,

Appellee,

—v.—

MARION E. MEADOWS,

Appellant.

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT**

BRIEF FOR THE APPELLEE

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FILED

JAN 5 1977

A. DANIEL FUSARD, CLERK

SECOND CIRCUIT

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TABLE OF CONTENTS

	PAGE
Statement of the Case	1
Statute Involved	2
Questions Presented	2
Statement of Facts	3
 ARGUMENT:	
I. A Grand Jury Witness May Not Invoke the Exclusionary Rule as a Basis for Refusal to Cooperate with an Inquiring Grand Jury, and a Refusal for that Reason to Comply with an Order of the Court Enforcing the Grand Jury's Demand for Fingerprints and Handwriting Exemplars is Not for Just Cause ...	5
II. It is Both Proper and Necessary that Technical Experts Assist Grand Juries in the Expedited Performance of Their Duties	7
CONCLUSION	8

TABLE OF AUTHORITIES

<i>In Re Millow</i> , 529 F.2d 770 (2d Cir. 1976)	6
<i>In re Persico</i> , 491 F.2d 1156 (2d Cir. 1974)	6
<i>In Re Weir</i> , 495 F.2d 879 (9th Cir.), cert. denied, 419 U.S. 1038 (1974)	6
<i>Robert Hawthorne, Inc. v. Director of Internal Revenue</i> , 406 F. Supp. 1098 (E.D. Pa. 1976)	7

	PAGE
<i>Smith v. United States, et al.</i> , 423 U.S. 1303 (1976)	6
<i>United States v. Calandra</i> , 414 U.S. 338 (1975) ...	6
<i>United States v. Dionisio</i> , 410 U.S. 1 (1972)	5, 7
<i>United States v. Mara</i> , 410 U.S. 19 (1972)	5, 7
<i>United States v. Turk</i> , 526 F.2d 654 (5th Cir. 1976); U.S. App. Pending	6
<i>United States v. United States District Court</i> , 238 F.2d 713 (4th Cir. 1956), cert. denied, 352 U.S. 981 (1957)	7
<i>United States v. Weiner</i> , 418 F. Supp. 941 (M.D. Pa. 1970)	6

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—v.—

MARION E. MEADOWS,

Appellant.

BRIEF FOR THE APPELLEE

Statement of the Case

This is an appeal from an Order of the District Court (Zampano, J.), entered October 5, 1976, finding appellant Meadows in contempt for refusal to provide handwriting exemplars and fingerprints to a grand jury investigating a bank robbery. Meadows appeared in District Court on October 5, 1976, and moved to quash his grand jury subpoena for that date on the grounds that the exemplars being sought were not relevant to a legitimate grand jury inquiry, and further that the exemplars would be used for comparison with documents illegally seized from his home.¹ The Court denied the motion to quash and directed

¹ Appellant doggedly persists in ascribing to the Government a concession that the search at Meadows' home was illegal. No such concession has been made. In fact, the Government stated unequivocally in open court, "We do not concede there was an illegal search." (App.85). Appellee simply maintains that the merits of the search are irrelevant to the issue herein. (App. 84-85).

Meadows to appear before the grand jury. He did so, was ordered to produce exemplars, refused, and was found in contempt. A stay of commitment was granted to allow a motion in the Court of Appeals for bond pending appeal which motion was denied on November 9, 1976. Meadows surrendered to the United States Marshal the next day and is now incarcerated.

Statute Involved

Title 28, United States Code, Section 1826--Recalcitrant Witness

(a) whenever a witness in any proceeding before or ancillary to any . . . grand jury of the United States refuses without just cause shown to comply with an order of the court to testify or provide other information . . . the court, upon such refusal . . . may summarily order his confinement . . . until such time as the witness is willing to give such testimony or provide such information

...

Questions Presented

I. Whether a grand jury witness is entitled to refuse to comply with an order of the Court enforcing a grand jury's demand for production of fingerprints and handwriting exemplars simply because he claims that said specimens will be compared with evidence that he asserts was illegally seized from his home.

II. Whether a witness may be compelled to produce handwriting exemplars and fingerprints to a member of the executive branch of Government acting on behalf of the grand jury.

Statement of Facts

On August 3, 1976 the Union Trust Company in Stamford, Connecticut was robbed by a lone black male who presented a handwritten demand note and a withdrawal slip bearing a name and the figures 5000 to a teller. The robber fled with approximately \$1,750.00, leaving the withdrawal slip in the bank. Witnesses observed the license plate of the getaway car, which was quickly traced to Meadows' possession. Police and F.B.I. agents arrived at his home within two hours of the robbery and recovered the demand note on the grounds of the home.

Meadows was first subpoenaed to appear before a grand jury on August 31, 1976 for the purpose of providing handwriting exemplars and fingerprints for comparison with the two notes and fingerprints found in the bank, however that grand jury was postponed. He was next subpoenaed to appear on September 17, 1976 in Hartford. He did so but refused to provide the exemplars. The term of the Hartford grand jury was to expire the next day, so Meadows was re-subpoenaed to appear in New Haven on September 27, 1976. He failed to appear on that date, a writ of habeas corpus was issued on October 1, 1976 and he was taken into custody on October 4, 1976. He was released that date on a non-surety bond and subpoenaed to the October 5, 1976 session of the grand jury, where he again refused to provide the exemplars.

During the hearing on appellant's motion to quash the subpoena, the Government filed affidavits outlining the scope of the grand jury inquiry and attesting to the relevance of the evidence sought. (App. 12-15, 36). The grand jury foreman also testified that they wanted the exemplars and had ordered Meadows to produce them.

(App. 57-62). The Court then signed an Order (App. 16-17) compelling production of the exemplars and Meadows was returned to the grand jury where he once again refused to comply. (App. 62-65). He was then held in contempt and ordered confined for the life of the grand jury or until he purges himself. (App. 70).

The Court noted two aspects of the compelled production of exemplars. First, since fingerprints and a withdrawal slip had been left in the bank, there was no issue with respect to search and seizure of this evidence and his Order allowed comparison of these items with the exemplars. With respect to the note found at Meadows' home, the Court set October 12, 1976 for argument on the issue of whether a hearing on the merits of the search must be held before the compelled exemplars could be compared with that evidence. (App. 54). A stay of commitment was granted to the hearing date. Arguments were held on October 12, 1976, and the Court reserved ruling. (App. 88). To date, the District Court has not ruled on the latter issue; however, Meadows is confined for refusal to provide the exemplars for comparison with the withdrawal slip and fingerprints left in the bank. For the reasons stated herein, the Government is of the opinion that if the exemplars are obtained they could be compared with the note found at the home as well; however, because of the bifurcated decision below, that issue is apparently not before this Court.

ARGUMENT

POINT I

A Grand Jury Witness May Not Invoke the Exclusionary Rule as a Basis for Refusal to Cooperate with an Inquiring Grand Jury, and a Refusal for that Reason to Comply with an Order of the Court Enforcing the Grand Jury's Demand for Fingerprints and Handwriting Exemplars is Not for Just Cause.

Title 28, United States Code, Section 1826(a) empowers a court to confine a witness who, without just cause, refuses its Order to provide evidence to a grand jury. Appellant claims that just cause is shown here because the specimens sought would be compared with items "patently and concededly" seized illegally from his home, and since there is a concession of illegality no suppression hearing is needed. This argument not only blithely ignores the fact that fingerprints and a withdrawal slip were left in the bank and therefore present no Fourth Amendment issue, it is also premised on a completely fictional representation that the Government has conceded the illegality of the seizure of the note found at appellant's home. The Government has stated precisely the contrary. It merely takes the position that the merits of the search are not relevant, (App. 85), and that no hearing on the legality of the seizure is needed as a predicate to a finding of contempt.

Furthermore, the law is squarely in conflict with appellant's position. There is no Fourth or Fifth Amendment right to refuse in the first instance production of identifying characteristics such as those sought here. *United States v. Dionisio*, 410 U.S. 1 (1972); *United States v. Mara*, 410 U.S. 19 (1972). Nor does it matter that

the grand jury inquiry itself may be based on evidence seized illegally. *United States v. Calandra*, 414 U.S. 338 (1975). See also *Smith v. United States, et al.*, 423 U.S. 1303, 1306 (1976). *In Re Millow*, 529 F.2d 770 (2d Cir. 1976); *United States v. Turk*, 526 F.2d 654, 666 (5th Cir. 1976), U.S. App. Pending; *In Re Weir*, 495 F.2d 879 (9th Cir.), cert. denied, 419 U.S. 1038 (1974); *United States v. Weiner*, 418 F. Supp. 941, 954 (M.D. Pa. 1976).

Appellant's Fourth Amendment arguments are therefore partly irrelevant and wholly without merit. His reliance on *In Re Persico*, 491 F.2d 1156 (2d Cir. 1974) is totally inapposite for two reasons. First, there is no concession of illegality here. Second, and perhaps more importantly, *Persico* dealt with electronic surveillance claims which, by statute,² are treated differently than ordinary Fourth Amendment claims. Appellant's refusal to produce the exemplars was without just cause.

² Title 18, United States Code, Section 3504. Litigation concerning sources of evidence.

(a) In any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, or other authority of the United States—

(1) Upon a claim by a party aggrieved that evidence is inadmissible because it is the primary product of an unlawful act or because it was obtained by the exploitation of an unlawful act, the opponent of the claim shall affirm or deny the occurrence of the alleged unlawful act.

(b) As used in this section "unlawful act" means any act the use of any electronic, mechanical, or other device (as defined in section 2510(5) of this title) in violation of the Constitution or laws of the United States or any regulation or standard promulgated pursuant thereto.

POINT II

It is Both Proper and Necessary that Technical Experts Assist Grand Juries in the Expedited Performance of Their Duties.

Appellant's claim that providing the exemplars to a member of the Justice Department violates unspecified "constitutional and statutory rights" demonstrates either a woefully inadequate understanding of the mechanics of a grand jury investigation or facetiousness. Surely it cannot be a serious contention that the foreman of the grand jury is expected personally to fingerprint appellant and make expert comparisons of fingerprints and handwriting exemplars. Of necessity, the Court ordered that the exemplars be provided to a person acting on behalf of the grand jury to facilitate the expert examination required. This is the traditional procedure, and the procedure that was in fact used in *United States v. Dionisio, supra*, and *United States v. Mara, supra*, which involved the compelled production of voice exemplars and handwriting specimens respectively. It has long been recognized that grand jurors are entitled to the assistance of experts, *United States v. United States District Court*, 238 F.2d 713 (4th Cir. 1956), cert. denied, 352 U.S. 981 (1957); *Robert Hawthorne Inc. v. Director of Internal Revenue*, 406 F. Supp. 1098, 1118 (E.D. Pa. 1976). Without assistance in cases of this nature, a grand jury would be incapable of fulfilling its function.

In conjunction with this argument appellant makes the bold but once again incorrect assertion that there is "no evidence of any kind before the grand jury in this matter" (appellant's brief p. 11) and that the grand jury is uninformed as to the whole proceeding. There is evidence pertaining to appellant before the grand jury,

the foreman stated in open court that they needed the exemplars as part of their investigation (App. 62), and the Court directed their production by appellant in the manner recommended by the foreman. Simple logic dictates that this be done with the aid of a person properly trained in the collection of such specimens.

CONCLUSION

For the foregoing reasons, appellant's refusal to comply with the Order of the District Court was not based on just cause, the finding of contempt was proper, and it is respectfully submitted that the order of commitment should be affirmed.

Respectfully submitted,

PETER C. DORSEY
United States Attorney

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★ U. S. Government Printing Office 1976— 714—020—ACT—308

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U S A,
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MARION E. MEADOWS,
APPELLANT

AFFIDAVIT OF SERVICE BY MAIL

Patricia D. O'Hara, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 51 West 70th Street, New York, N. Y. 10023

That on the 5th day of January, 1977, deponent served the within Appeal Brief upon William S. Herrmann, Esq., 16 Oak Street, Stamford, Conn. 06905

Attorney(s) for the Appellant in the action, the address designated by said attorney(s) for the purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in a post office official depository under the exclusive care and custody of the United States Post Office department within the State of New York.

Patricia D. O'Hara

Sworn to before me,

This 5th day of January, 1977

Pierre L. Phard
PIERRE L. ST. PHARD
Notary Public, State of New York
No. 24-4504294
Qualified in Kings County
Commission Expires March 30, 1977